IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE V.K.MOHANAN

THURSDAY, THE 4TH OCTOBER 2007 / 12TH ASWINA 1929

AS.No. 580 OF 2001()

OS.364/1995 OF SUB COURT, MANJERI

APPELLANT/DEFENDANTS 1 TO 4 & 6:

1. MOIDEEN, S/O. PURUTHALANGODAN KUNHALAVI, AGED 55 YEARS, RESIDING AT PULPATTA AMSOM, VALAMANGALAM DESOM, ERNAD TALUK.

2. PATHUMMA, W/O.. PEEDIKAPARAMBAN MAMMEDISSA, AGED 45 YEARS, DO.

3. KUNHIPATHUMMA, W/O. PURUTHALANGODAN KUNHALAVI, AGED 80 YEARS, DO.DO.

4. PATHUMMA, D/O. , PURUTHALANGODAN ALAVI, AGED 29 YEARS, DO. DO.DO

5. AYISSA, W/O.. PURUTHALANGODAN ALAVI, AGED 50 EARS, DO. DO.DO

BY ADV. SRI.M.A.ABDUL HAKHIM
SRI.SIBY J.MONIPPALLY

RESPONDENTS/PLAINTIFF & 5TH DEFENDANT:

1. PATHUMMA, D/O. PURUTHALANGODAN KUNHALAVI, AGED 85 YEARS, TRIPPANACHI AMSOM, MUTHANOOR DESOM, ERNAD TALUK. (DIED)

2. MUHAMMEDKUTTY, S/O. PURUTHALANGODAN ALAVI, AGED 25 YEARS, DO. DO.DO

ADDITIONAL RESPONDENT NO:-

3. PURUTHALANGODAN MUHAMMED MUSALIAR @ BAVU MOLLA, AGED 60 YEARS, TRIPPANACHI AMSOM, MUTHANOOR DESOM, ERNAD TALUK.

4. PURUTHALANGODAN PATHUMMA, AGED 70 YEARS, ERNAD TALUK, PULPATTA AMSOM, VALAMANGALAM DESOM.

(ADDITIONAL R3 & R4 ARE IMPLEADED AS THE LEGAL REPRESENTATIVES OF THE DECEASED 1ST RESPONDENT VIDE ORDER DATED 5.12.2005 IN I.A. 905/2004.)

ADV. SMT.PREETHY KARUNAKARAN
SRI.R.RAJESH KORMATH
SRI.ANISH S.AMBADY
SMT.BIJIMOL JOSE
SRI.K.M.FAISAL (KALAMASSERY)
SMT.SANJANA R.NAIR
SMT.MEENA.A.
SMT.M.R.MINI
SRI.RAHUL VARMA
SRI.V.S.ROBIN

THIS APPEAL SUITS HAVING BEEN FINALLY HEARD ON 4/10/2007, THE COURT ON THE SAME DAY, DELIVERED THE FOLLOWING:

A.S. NO. 580/2001

ORDER ON CMP NO. 4077/2001 IN A.S. NO. 580/2001

// DISMISSED //

4TH OCTOBER, 2007. SD/-
P.R. RAMAN, JUDGE.

// TRUE COPY //

P.S. TO JUDGE.

KNC/-

P.R. RAMAN & V. K. MOHANAN, JJ.

A.S. NO. 580 OF 2001

DATED THIS, THE 4TH DAY OF OCTOBER, 2007.

J U D G M E N T

Raman, J.

Appellants are defendants 1 to 4 and 6 in O.S. 364/1995 on the file of the Sub Court, Manjeri. Respondents are the plaintiff and the 5th defendant. So however, the 5th defendant was only supporting the case of the appellant.

2. The plaintiff, the first respondent instituted the suit for partition of the plaint schedule properties. it consists of an extent of 72 cents of land along with a building thereon. The plaintiff claimed one half share over the plaint schedule property. Schedule 1A of the plaint gives the genealogy of the parties. Bangalath Rayin Pathumma, the mother of the plaintiff had two children - the plaintiff and Kunjalavi, who admittedly, predeceased Bangalathu Rayin Pathumma, in 1958. Kunjalavi had three children who are defendants 1, 2 and Alavi. Alavi died before the suit leaving behind him his wife and two children who are Defendants 4 to 6. 3rd defendant is the wife of Kunjalavi. According to the plaint averments, the property originally belonged to the plaintiff's mother Bangalath Rayin Pathumma as

per an oral lease of the year somewhere in 1910. After the death of Kunjalavi some time in the year 1958, his mother Bangalath Rayin Pathumma died in the year 1965. Since Kunjalavi, the plaintiff's brother predeceased Rayin Pathumma, as per the Mohammedan law, she becomes entitled to one half right over the property. The remaining half right belonged to the defendants. On the other hand, the defendants contended thaht the property was taken on oral lease by Kunjalavi and not by Rayin Pathumma as alleged in the plaint. At the time of death of Kunjalavi, his children were of tender age. Rayin Pathumma continued to reside in the house where the defendants were residing and she was looking after their affairs. Subsequently, they also obtained purchase certificate from the Tribunal as per the provisions of the Kerala Land Reforms Act and thus became absolute owner of the property. The plaintiff subsequently, amended the plaint to raise a plea that at any rate, the plaintiff will be entitleld to 1/12th share over plaint schedule item even if it has to be held that there was an oral lease in favour of Kunjalavi, since after the death of Kunjalavi in the year 1958, his 1/6th share will devolve on his mother Rayin Pathumma and so the plaintiff will be entitleld to 1/12th share. The defendants in their additional written statement submitted that the plaintiff

will be entitled to 1/12th share; but according to them, the value of the same was paid to her way back in the year 1969 when they effected a partition.

3. The evidence in this case consists of Exts.A1 toA4 on the side of the plaintiff and Exts.B1 to B3 on the defendants' side, besides Court exhibits Exts.C1 and C2. On the side of the plaintiff PWs 1 and 2 were examined and DWs1 to 3 on the side of the defendants. The court below decreed the suit as prayed for against which the defendants have preferred this appeal.

4. It is contended by the appellants that the finding of the court below is contrary to the evidence in the case and perverse. According to them, the plaintiff has not discharged her onus of proving that the plaint schedule property is liable to be partitioned. According to them, Exts.A1 and A1(a) produced in the case which are revenue receits issued in the name of the mother Bangalath Rayin Pathumma was subsequent to the death of Kunjalavi and therefore, it will not advance the case of the plaintiff as alleged in the plaint. According to them, after the death of Kunjalavi, since his children were of tender age, Rayin Pathumma continued to be in management of the property and therefore, the fact that one or two tax

receipts were taken in the name of Rayin Pathumma by itself will not prove the oral lease as set up by the plaintiff. It is their further case that the plaintiff has not produced any evidence to show possession prior to 1958 before the death of Kunjalavi. Though according to the learned counsel, after the death of Kunjalavi, plaintiff is entitled to 1/12th share the value of the share having been paid way back in the year 1965, they are not entitled for partition of the property.

5. Per contra, learned counsel appearing for the respondents would contend that the trial court, on an analysis of the materials available on record, has rightly decreed the suit and being an appellate court, unless it is found that the conclusion reached by the court below is perverse, the view taken by the court below may not be disturbed.

6. We have heard both sides. Both sides have set up their case based on an oral lease. While the plaintiff would contend that Rayin Pathumma has taken an oral lease, the defendants would contend that it was Kunjalavi who took the oral lease. Both sides did not produce any acceptable evidence in this matter. True that Exts.A1 and A1(a) are receipts for payment of tax ie., for the period 1959 and 1960. Admittedly, Kunjalavi died in 1958 and therefore, the tax receipts as produced will not prove

possession prior to 1958. In this background, it has to be appreciated that Kunjalavi was the only son of Rayin Pathumma and she was residing with him and Kunjalavi died in the year 1958 at a time when all his children were of tender age. If so, Exts.A1 and A1(a) in no way can be accepted as a piece of evidence to prove the oral lease as set up by the plaintiff in the name of Rayin Pathumma. Even though it is contended that the defendants were not able to produce any tax receipt for payment of tax or other acceptable evidence, that will in no way advance the case of the plaintiff. The burden of proof is on the plaintiff and unless that initial burden is discharged, the onus will not shift to the defendants. In this case, except Exts. A1 and A1(a), there is no other documentary evidence to show and prove that there was an oral lease as contended by the plaintiff in the name of Bangalath Rain Pathumma. On the other hand, the defendants have also produced revenue receits of the year 1962 - 1963 as Ext. B3 series. For the same reason as stated earlier, the tax receipts so produced by the defendants would only show that they were paying tax subsequent to the death of Kunjalavi and not prior thereto. The court below, in this connection, has misconstrued to say that Exts.A1 and A1(a) are tax receipts issued in the name of Rayin Pathumma and others. At the same time, the conclusion

reached by the court below that on considering the available evidence, it can only be held that tax was paid by Rayin Pathumma and the plaintiff is unsupported by the evidence in the case. The only evidence worth is Exts.A1 and A1(a) in this regard which has been considered in the above paragraph. In the absence of any other evidence, it has to be held that the plaintiff has not discharged her burden.

7. Admittedly, Kunjalavi predeceased Rayin Pathumma. If so, on the death of Kunjalavi, 1/6th right will devolve on Rayin Pathumma and the plaintiff being her daughter, is entitled to one half of 1/6 ie. 1/12th share of the plaint schedule property. Even though the defendants contended that the value of the share has been paid there is absolutely no evidence produced and it is only an afterthought since the original stand of the defendants was that the plaintiff is not entitled to any share in the property. It is only in the additional written statement filed against the amendment of the plaint, that they were constrained to admit the fact that the plaintiff is entitled to 1/12th share and it was only then that they came with a new case that the value of the share has been paid to the plaintiff.

8. Hence, in partial modification of the decree passed by the court below the suit is decreed declaring that the plaintiff is entitled for 1/12th

share over the plaint schedule item. The residential building in the plaint schedule item, however, will be reserved in favour of the defendants. The said property however, will be valued and the plaintiff will be entitled to 1/12th share over the same.

The parties shall bear their respective costs.

P.R. RAMAN,
(JUDGE)

V. K. MOHANAN,
(JUDGE)

knc/-

P.R. RAMAN &
V.K. MOHANAN, JJ.
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A.S. NO. 580 OF 2001

J U D G M E N T

4TH OCTOBER, 2007.